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[*Dartey v. Zack Co. of Chicago*](#), 82-ERA-2 (ALJ June 7, 1982)

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U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 82-ERA-2

In the Matter of

DEAN DARTEY,
Complainant

vs.

ZACK COMPANY OF CHICAGO
(Midland Nuclear Power
Plant, Midland, Michigan),
Employer

ROBERT J. KRUPKA, ESQ.
Cook, Nash and Deibel
1201 Second National Bank Building
Saginaw, Michigan 48607
For the Complainant

LEOPOLD P. BORRELLO, ESQ.
Borrello and Thomas
721 South Michigan Avenue
Saginaw, Michigan 48602
For the Employer

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding to impose remedial and compensatory sanctions under the employee protection provisions of the Energy Reorganization Act (42 U.S.C. § 5851).

Statement of the Case

In 1980, Complainant was employed by the Employer to work on a job site at midland, michigan, where Employer as a subcontractor was doing heating, ventilating and air conditioning work for Bechtel Corporation, the general contractor, in the construction of a nuclear power plant for Consumers Power Company, the owner and/or prospective operator of the plant.

On or about March 20, 1980, Complainant reported orally and later filed a written complaint to the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor that he had been suspended for 30 days without pay because he had previously notified the Nuclear Regulatory Commission (NRC) that some of the ducts and other equipment being installed by the Employer failed to comply with federal requirements for nuclear plants. Subsequently, his complaint was referred to the Department of Labor's Wage and Hour Division and was amended to include his discharge for the same reason. Notice of the Complaint was given to the Employer by OSHA under date of April 7, 1980, and by the Wage and Hour Division under date of September 11, 1981.

After conducting an investigation, the Area Director of the Wage and Hour Division advised the Employer by letter dated November 10, 1981, of his determination that Complainant was a protected employee engaging in a protected activity within the ambit of the Energy Reorganization Act and that discrimination as defined and prohibited by the statute was a factor in the actions which comprised his complaint. He further informed the Employer that the following actions were required to abate the violation: Reinstatement with back wages and any expenses incurred, including attorney's fees, and he duly advised the Employer of his rights of appeal and formal hearing. By telegram dated November 16, 1981, addressed to the Chief Administrative Law Judge, Employer duly appealed from the Area Director's determination and requested a hearing.

Initially, Employer moved to dismiss the proceeding on the ground that the complaint was not served within thirty days after the alleged act of discrimination and that the Secretary of Labor did not issue an order thereon within ninety days of the receipt of such complaint. That motion was in all respects

denied by decision dated January 29, 1982 herein. Pursuant to waivers of time limitations, stipulations of counsel, and orders dated December 14, 1981, March 22, 1982 and May 19, 1982 herein, the time for holding the hearing, issuance of the recommended decision and issuance of the Secretary's final order have been duly extended.

The hearing was held on March 16, 1982, and the Employer's post-hearing brief was filed on May 18, 1982. The time in which the Secretary may issue a final order herein is extended for sixty days from the date hereof.

Findings of Fact

Although the reasons for Complainant's suspension and discharge are hotly disputed, there is little or no conflict in the evidence with respect to the operative acts and circumstances leading to those adverse actions. The material facts set forth below are found from the record herein.

Complainant was hired by Employer on January 10, 1980. For the first five or six weeks, he worked in the Document Control Department and did receipt inspection under the guidance of Level 2 Quality Control Inspectors. He was then promoted to a Level 1 Quality Control Inspector and worked in the field, performing inspections in the fabrication shop and other buildings in the plant where the Employer was performing work. His principal function was the visual inspection of heating, ventilating and air conditioning duct work. In the event that a defect in workmanship or failure to comply with specifications was found in the course of such inspection, a non-conformance report was made out and the defective work was tagged until the defect was corrected.

Observing that some of the defects he had called attention to were not being corrected, Complainant reported that fact to his immediate foreman and to the Quality Control Manager. Though minor problems were usually resolved, Complainant believed that major problems were compromised unsatisfactorily. Consequently, on or about February 20, 1980, he reported the alleged uncorrected defects or non-compliance to the NRC, which maintained an on-site inspection unit. Following several discussions with

[Page 4]

NRC inspectors and investigators, Complainant gave the NRC a documented and signed statement of his charges dated March 12, 1980.

Meanwhile, between March 7 and March 10, 1980, Employer's Quality Control Manager reported by telephone to Employer's president at its main office in Chicago that he had learned that NRC was about to investigate Employer relative to its work at the Midland Plant, and that such investigation was the result of allegations made by complainant.

On March 13, 1980, the Quality Control Manager called a meeting of inspectors, including Complainant, at which the handling of records and the NRC investigation were discussed. The Quality Control Manager advised the inspectors that only two designated persons were to have access to the document vault, that sign-out was required if records were taken, that no inspection reports or drawings were to be removed from the job site, and that if this was violated, termination would result. He then stated that he was required

to inform them that they were to cooperate with the NRC investigators and to answer truthfully any direct questions asked of them. He cautioned them however not to volunteer information nor to "spill your guts".

On March 17, 1980, Complainant was interviewed by Employer's attorney and by its Operations Manager and Vice-President in the office of the Quality Control Manager. Complainant was asked why he thought there were problems on the job and why he had made allegations to the NRC. Complainant then refused to acknowledge that he had made allegations. The interview was held about 9 A.M. on March 17, and on the same day Complainant was taken off field inspection and was re-assigned by his foreman (at the direction of the Quality Control Manager) to work in Document Control, where he had initially been assigned as a trainee. Complainant protested the re-assignment, but undertook the job of listing non-critical travelers or documents by number, working under close observation and supervision.

On March 19, 1980, Complainant was two minutes late for work, for which he was reprimanded by the Quality Control Manager. A short time later, after having been told by the immediate supervisor at Document Control that he was not to leave his desk unless he was given permission to go to the bathroom, Complainant returned to the Quality Control Manager's

[Page 5]

office and angrily protested his duty assignment and treatment. He was thereupon given a one-day suspension without pay.

March 19th was a pay-day, and after some delay in getting his check, Complainant started to leave the plant. When he reached the time clock office he was told that somebody from the Employer wanted to talk to him, but when no one showed up after about twenty minutes, Complainant attempted to leave the plant in his own truck. He was stopped at the gate, however, by security guards who asked him to consent to their searching his vehicle. He consented and the guards found underneath the driver's seat about fifteen personnel qualification records of terminated inspectors belonging to the Employer.

The Consumer Power security supervisor was then called and he took a statement from complainant, following which the files were returned to the Employer. The Quality Control Manager thereupon called Employer's President and advised her that Complainant was caught attempting to remove records off the site. Not being certain, however that Complainant had actually taken the files, and being concerned that somebody might have "planted" the files in Complainant's truck, it was decided after conferring with Employer's attorney to suspend Complainant rather than discharge him at that point. The Quality Control Manager then told complainant before he left the premises that day that he was suspended for thirty days without pay, and took possession of Complainant's identification badge.

On or about April 7, 1980, Employer was notified by OSHA tht Complainant had filed a protest against his suspension without pay. It was not until April 18 or 19, 1980, that Employer received a copy of the statement that Complainant had made to the Consumers Power Security Officer. Only then did its executives have actual knowledge that Complainant had taken the files off site about three days prior to March 19th when they were discovered in his truck.

Since the day after the suspension period fell on Saturday, Complainant did not return to the job site until Monday, April 21, 1980. He was then stopped at the gate and told to go home. Later that day he received a telegram from Employer's operations Manager and Vice-President notifying him that his employment was terminated for cause, effective

[Page 6]

April 20, 1980, for the following reasons:

1. Failure to meet appropriate attendance standards;
2. Repeated refusal and failure to perform the assigned tasks for which you were employed, in accordance with proper procedures;
3. Insubordination;
4. Unauthorized appropriations of private individual personnel files;
5. Attempted unauthorized removal or theft of private individual personnel files from premises;
6. You have raised and asserted certain alleged concerns. There are normal channels provided for the addressing of all concerns. At any phase, an unsatisfactorily answered concern has a recourse open to it. You have chosen to consistently and deliberately handle your concerns in a disruptive, provocative, unprofessional and self-serving manner, calculated to undermine the ability of all concerned, particularly this Company, to properly address and resolve those issues.

Complainant had taken the files for the purpose of obtaining information as to names and addresses of other inspectors who might have had similar problems prior to their termination, which the NRC investigators had indicated might be helpful to them. In view of the restrictions on his movements, he had not yet been able to return the files without detection.

On March 19, 1980, the date of Complainant's suspension, his wage rate was \$6.35 per hour and he regularly worked a 40-hour week.

[Page 7]

Conclusions of Law

The employee protection provisions of the Energy Reorganization Act embody the following prohibition (42 U.S.C. § 5851(a)):

Discrimination against employee

(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -

(1) commenced, caused to be commenced or is about to commence or cause to be commenced a proceeding under this chapter, or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

The issue to be determined is therefore whether, within the meaning of the above provision, the Complainant was discharged or suspended without pay because he requested, assisted or participated in any manner in the NRC investigation.

In the labor relations cases, dealing with statutes protecting the rights of employee to engage in activities related to union organization or recognition, a distinction was drawn between pretextual and dual motive cases. Where an employer asserted a legitimate business reason for his action, but the evidence showed that no such reason existed or was not relied upon, the asserted cause for the adverse action was said to be pretextual. Where, however, the discipline

[Page 8]

decision involved two factors, the first a legitimate business reason, and the second a reaction to the employee's protected activity, the case was denominated as dual motive. The National Labor Relations Board and many of the circuit courts formerly applied "in part" or "dominant motive" tests in determining whether a discharge or other disciplinary action constituted an unfair labor practice. See, e.g., *Youngstown Osteopathic Hospital Association*, 224 NLRB 574, 575, 92 LRRM 1328 (1976); *Allen v. N.L.R.B.*, 561 F.2d 976, 982 (D.C. Cir. 1977); *N.L.R.B. v. Billen Shoe Co., Inc.*, 397 F.2d 801 803 (1st Cir. 1968).

In the area of disciplinary action against an employee in violation of his constitutional rights, however, the Supreme Court had applied a different test of causation in a dual

motive case, In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court stated:

Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U.S. at 287]

Thus in *Wright Line*, 251 NLRB No. 150, 105 LRRM 1169 (1980), the National Labor Relations Board relying on *Mt. Healthy*, *supra*, applied a "but for" test to resolve the question of causation where there was dual motive. On appeal, the Circuit Court agreed that the existence of employment discrimination was most accurately determined by asking whether the discharge or other adverse action would have occurred "but for" the protected activity. Consequently, it granted enforcement of the N.L.R.B. order directing reinstatement with back pay, although expressing the view that the burden of proof on

[Page 9]

the employer was one of going forward with the evidence rather than one of ultimate persuasion. *N.L.R.B. v. Wright Line*, 662 F.2d 899 (1st Cir. 1981).

The *Mt. Healthy* and *Wright Line* test of causation, shifting to the employer the burden to prove that the adverse action would have taken place in the absence of the protected activity, has been expressly adopted in the Sixth Circuit, in which this claim arose. See *N.L.R.B. v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981).

Applied specifically to the employee protection provisions of the Energy Reorganization Act (42 U.S.C. 55851), the "but for" test is utilized to determine causation and the rule of the *Mt. Healthy* case (*supra*) has been adopted, placing the burden on the employer to show by a preponderance of the evidence that it would have reached the same decision as to the employee's dismissal even in the absence of the protected conduct. *Consolidated Edison Company of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982).

Analyzing the evidence at hand in the light of the above authorities, we must first recognize that we are faced with two separate, though related, employment decisions: the suspension without pay on March 19, 1980, and the discharge as of April 20, 1980. Consider the sequence of events following March 10, 1980, when Employer first learned that an NRC investigation was imminent as the result of Complainant's allegations: the meeting at which a warning was given about removing documents and not volunteering; the questioning of Complainant by Employer's lawyer as well as its operations Manager

and Vice President; the assignment of Complainant to desk work under close supervision; the one-day suspension for a relatively minor protest; the temporary stopping of Employer's work by reason of the NRC investigation; and the unexplained call to the time clock office to detain Complainant and the subsequent search of his vehicle. There can be little doubt that Complainant established a *prima facie* case that his disclosures to the NRC were a motivating factor in Employer's decisions first to suspend him without pay and then to discharge him.

The next question, of course, is whether Employer has sustained its burden to prove that its decisions to suspend and then to discharge would have been made in the absence

[Page 10]

of such disclosures. The weight of the evidence with respect to each of those decisions is not the same.

Of the six asserted reasons for termination listed in the telegram delivered on April 21, Employer clearly failed to establish any merit to the first three: No attendance records were submitted and the testimony as to tardiness was of minimal consequence; as to alleged repeated refusal and failure to perform assigned tasks, there was no evidence of any criticism of Complainant's work prior to March 10, 1980, the only adverse notations in the record being dated March 14 and March 17, 1980, both of them being of little significance and supporting an inference that efforts were made to create an unfavorable performance record after Employer learned of Complainant's reporting to the NRC; the only evidence that could be characterized as insubordination was Complainant's angry protest against his reassignment to Document Control, for which he was given a one-day suspension without pay. Thus we are left with Items 4 and 5 dealing with unauthorized appropriation and attempted removal or theft of the private individual personnel files. The fustian language of Item 6 refers in essence to Complainant's allegations to NRC and was so acknowledged by the Quality Control Manager as one of the concerns not addressed through normal channels. Consequently, we have 4 and 5 asserted as a legitimate business reason and No. 6 as the protected activity - a dual motive situation. In view of all of the evidence known to Employer at the time of termination, it cannot fairly be said that but for his "whistle-blowing" to the NRC, Complainant would not have been discharged. His acknowledged removal of the terminated inspector files from the Job site may have been a sufficient reason for that decision.

The decision on March 19th, however, to suspend Complainant without pay cannot be similarly justified. At that time all that Employer knew about the files was that they had been found in his vehicle before he left the site. They did not know whether the files had ever been taken off-site, or whether they had been "planted" in his truck, or whether he had received them from an authorized source, or whether he intended to retain them. Yet Employer claims to have suspended him without pay because its Quality Control manager and its President

[Page 11]

suspected that he may have violated a company rule or possibly committed larceny.

Section 5851 does not forbid discharge alone. It prohibits discrimination against any employee with respect to his compensation, terms, conditions or privileges of employment. If Employer did not believe it had valid grounds to discharge him on March 19th, it did not have a valid reason to suspend him without pay.

Suspension alone may be regarded as a precautionary step, but suspension without pay is a punitive measure. Considering Employer's uncertainty and its previously mentioned reactions after learning by March 10th of Complainant's disclosures to NRC, it is not unreasonable to infer that on March 19th, Complainant was being punished because of such disclosures, rather than because of a purported supposition that he had appropriated, removed or stolen some files pertaining to terminated inspectors. Employer has failed to prove that absent his NRC allegations, Complainant would have been suspended on March 19th for thirty days without pay.

I therefore conclude that on March 19, 1980, Employer wrongfully suspended Complainant without pay for thirty days in violation of the employee protection provisions of the Energy Reorganization Act (42 U.S.C. § 5851). I further conclude that Complainant is entitled accordingly to compensation (back pay) at the rate of \$6.35 per hour for each eight-hour working day during the period of said suspension, with interest thereon and such costs and expenses (including reasonable attorneys' fees) as may be assessed in the event that the Secretary of Labor issues a final order confirming this conclusion. Since it has not been established that Complainant's discharge effective April 20, 1980 was in violation of Section 5851, the Area Director's determination that Complainant is entitled to reinstatement should be vacated.

[Page 12]

RECOMMENDED ORDER

Upon the entire record herein, Zack Company of Chicago, the employer herein, is hereby directed to pay to Dean Dartey, the complainant, compensation (back pay) at the rate of \$6.35 per hour for each eight-hour business day during the period from March 19, 1980 to and including April 18, 1980, together with interest thereon at the rate of six percent per annum from the due dates thereof to the date of payment; and in the event the Secretary of Labor issues his final order herein confirming such compensation, said Employer is further directed to pay such costs and expenses (including reasonable attorneys' fees) as may be thereupon assessed; and it is further ordered that so much of the Area Director's determination dated November 10, 1981 as directs Employer to reinstate Complainant be, and the same hereby is, vacated and set aside.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: June 7, 1982
Washington, D.C.

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